IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC,** d/b/a Hustler Magazine, et al, Defendant.	)))))))))))))	CASE NO. 1:08-cv-00421-TWT

BRIEF IN SUPPORT OF DEFENDANT'S MOTION
FOR PROTECTIVE ORDER

Defendant LFP Publishing Group, LLC ("LFP") respectfully submits this brief in support of its Motion for Protective Order.

I. Introduction

Plaintiff seeks to discover certain financial and net worth information of LFP and several non-parties "for purposes of Plaintiff's claim for punitive damages." LFP has timely objected to Plaintiff's "punitive damages" discovery because Plaintiff has not alleged in her Complaint the premeditated, conscious and deliberate misconduct by LFP required to state a claim for punitive damages; and

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were she to do so, such allegations would be frivolous because it cannot be legitimately contended that LFP did not reasonably, and in good faith, believe it had the right under the U.S. Constitution to publish the images of Ms. Benoit at issue, where even this Honorable Court agreed that the Constitution protected that publication. LFP also objects to Plaintiff's efforts to obtain "punitive damages" discovery from non-parties L.F.P., Inc., LE Publishing Advisors, LLC and LE Publishing, LLC, through requests to LFP.

The parties have conferred in good faith through their respective counsel by telephone and by correspondence in an attempt to resolve this discovery dispute without the intervention of the Court, without success.[1]

LFP thus respectfully submits that, pursuant to Fed. R. Civ. P. 26(c), and as described more fully below, good cause exists for entry of a protective order protecting LFP from Plaintiff's improper, burdensome, and unnecessary "punitive damages" discovery.

II. Plaintiff's Discovery Requests

Plaintiff seeks improper "punitive damages" discovery from LFP and non-parties LE Publishing, LLC, LE Publishing Advisors, LLC and L.F.P., Inc. through the following discovery requests:

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[1] See correspondence attached hereto at Exhibits A and B.

A. Plaintiff's First Interrogatories to Defendant[2]

- Interrogatory No. 7: The net worth of Defendant LFP Publishing Group, LLC for the years ending 2006, 2007, 2008, and 2009 to date;

- Interrogatory No. 8: The net worth of non-party LE Publishing, LLC for the years ending 2006, 2007, 2008, and 2009 to date; and

- Interrogatory No. 9: The net worth of non-party L.F.P., Inc. for the years ending 2006, 2007, 2008, and 2009 to date.

B. Plaintiff's First Request for Production of Documents to Defendant[3]

- Document Request No. 2: Profit and loss and/or operating statements for LFP Publishing Group, LLC for each month in calendar years 2006, 2007, 2008, and 2009 to date;

- Document Request No. 3: Profit and loss and/or operating statements for non-party L.F.P., Inc. for each month in calendar years 2006, 2007, 2008, and 2009 to date;

- Document Request No. 4: Profit and loss and/or operating statements for non-party LE Publishing Advisors, LLC for each month in calendar years 2006, 2007, 2008, and 2009 to date;

- Document Request No. 5: A statement of net worth or financial statement for LFP Publishing Group, LLC d/b/a "Hustler Magazine" for the years 2006, 2007, 2008, 2009, to date;

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[2] Plaintiff's First Interrogatories to Defendant are attached hereto at Exhibit C; LFP's responses and objections are attached hereto at Exhibit D.

[3] Plaintiff's First Requests for Production of Documents to Defendant are attached hereto at Exhibit E; LFP's responses and objections are attached at Exhibit F.

- Document Request No. 6: A statement of net worth or financial statement for non-party L.F.P., Inc. for the years 2006, 2007, 2008, 2009, to date; and

- Document Request No. 7: A statement of net worth or financial statement for non-party LE Publishing Advisors, LLC for the years 2006, 2007, 2008, 2009, to date.

C. Plaintiff's Rule 30(b)(6) Notice of Deposition of LFP[4]

- 30(b)(6) Topic No. 3: The net worth of Defendant LFP Publishing Group, LLC for the years ending 2006, 2007, 2008, and 2009;

- 30(b)(6) Topic No. 4: The net worth of non-party L.F.P., Inc. for the years ending 2006, 2007, 2008, and 2009;

- 30(b)(6) Topic No. 8: Profit and loss and/or operating statements for LFP Publishing Group, LLC for each month in calendar years 2006, 2007, 2008, and 2009;

- 30(b)(6) Topic No. 9: Profit and loss and/or operating statements for non-party L.F.P., Inc. for each month in calendar years 2006, 2007, 2008, and 2009;

- 30(b)(6) Topic No. 10: A statement of net worth or financial statement for LFP Publishing Group, LLC d/b/a 'Hustler Magazine' for the years 2006, 2007, 2008, and 2009; and

- 30(b)(6) Topic No. 11: A statement of net worth or financial statement for non-party L.F.P., Inc. for the years 2006, 2007, 2008, and 2009.

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[4] Plaintiff's Rule 30(b)(6) Notice of Deposition to LFP is attached hereto at Exhibit G; LFP's response and objections thereto are attached at Exhibit H.

III. Legal Standard for Granting Protective Orders

Rule 26(c)(1) of the Federal Rules of Civil Procedure provides that a court may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." To that end, a court may among other things issue an order "forbidding the disclosure or discovery" (Fed. R. Civ. P. 26(c)(1)(A)) or "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters" Fed. R. Civ. P. 26(c)(1)(D).

The Court enjoys wide discretion to enter protective orders that accomplish expeditious discovery without compromising the rights of the parties. *See In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 357 (11th Cir. 1987). A protective order should issue if good cause is shown and a balancing of the parties' interests weighs in favor of issuing such an order. *Id*. at 356; *see also McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989). "[G]ood cause," although difficult to define, "generally signifies a sound basis or legitimate need to take judicial action." *In re Alexander Grant Litigation*, 820 F.2d at 366. In addition, this Court has held that in determining good cause, "federal courts have imposed a balancing the interests approach such that courts balance the non-movant's interest in obtaining the information against the movant's interest in keeping the information private." *Williams v. The Art Institute of Atlanta*, No. 1:06-CV-0285-CC/AJB, 2006 WL 3694649, at *12 (N.D. Ga. Sept. 1, 2006) (Braverman, Mag.).

IV. Argument and Citation of Authority

A. Plaintiff Is Not Entitled To "Punitive Damages" Discovery Because Her Complaint Does Not And Cannot State A Valid Claim For Punitive Damages

Punitive damages may be obtained for a violation of Georgia's right of publicity only where "the acts of the defendant have been of such a character to import premeditation or knowledge and consciousness of the appropriation and its continuation." *Cabaniss v. Hipsley*, 114 Ga. App. 367, 386-87, 151 S.E.2d 496, 509 (1966) (emphasis added); *see also Alonso v. Parfet*, 253 Ga. 749, 750, 325 S.E.2d 152, 154 (1985) (quoting *Cabaniss*).

Plaintiff contends her requests for "punitive damages" discovery from LFP are relevant and discoverable because LFP "was fully aware at the time of publication that publishing nude photographs of Nancy Benoit was a clear violation of Plaintiff's right of publicity," that LFP "heedlessly proceeded" to publish the images "despite Plaintiff's [January 16, 2008] warning" to the contrary, and because "Plaintiff properly prayed specifically for punitive damages in her Verified Complaint." (Ex. A hereto at pp. 2-3.) As explained more fully below, neither the facts known to Plaintiff nor the allegations in her Complaint support these contentions: Plaintiff's Complaint does not allege that LFP acted with the premeditation, malicious intent and continuing appropriation required to justify a claim for punitive damages under Georgia law, nor could Plaintiff in good faith allege such conduct.

1. Plaintiff's Complaint Does Not Allege A Factual Basis For An Award of Punitive Damages

As a threshold matter, Plaintiff's Complaint asserts only one conclusory sentence in support of her claim for punitive damages: "Defendants are liable to Plaintiff for actual and punitive damages for violation of Nancy Benoit's right of publicity in an amount to be determined by a jury." (Pl. Cmplt., Docket Index ("D.I.") 1 at ¶ 30.) This naked demand lacks any factual basis upon which the Court may award punitive damages and accordingly, following recent U.S. Supreme Court holdings clarifying the pleading standards applicable to such civil claims, Plaintiff has not stated a valid claim for punitive damages which would authorize the discovery she seeks from LFP.

Specifically, in *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" and that "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. The Supreme Court also expressed doubt about whether discovery on claims that do not satisfy this pleading threshold should be required: "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Id*. at 558 (citations omitted).

Further, in *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S. Ct. 1937 (2009), the Supreme Court more recently expounded on *Twombly*, holding that "the pleading standard Rule 8 announces . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. Importantly, in *Iqbal* the Supreme Court made clear that where a plaintiff's "complaint is deficient under Rule 8, [s]he is not entitled to discovery, cabined or otherwise." *Id*. at 1954 (emphasis added).

Where, as here, a plaintiff seeks discovery on a claim that lacks a factual basis in the pleadings, federal courts have held that the pleading standards set forth in *Twombly* and *Iqbal* support the entry of a protective order prohibiting discovery on the deficient claim. *See, e.g., Comm. for Immigrant Rights of Sonoma County v.*

County of Sonoma, 644 F. Supp. 2d 1177, 1211 (N.D. Cal. 2009) (granting defendants' motion for protective order: "For now the court relies on Rule 26(c) under which County Defendants have brought their motion for a protective order, while looking to *Iqbal* for guidance.")

Plaintiff's one-sentence assertion that punitive damages are appropriate offers only "labels and conclusions" and a "the-defendant-unlawfully-harmed-me accusation" insufficient to authorize "punitive damages" discovery after *Iqbal*. Accordingly, LFP respectfully submits that a protective order should be entered to protect it from undertaking the unnecessary burden and expense of producing the confidential information sought.

2. Plaintiff Cannot, Under Any Set Of Facts, In Good Faith Assert A Basis For An Award Of Punitive Damages

Nor can Plaintiff rescue her facially-deficient claim for punitive damages by merely amending her Complaint to allege that LFP acted with premeditation, conscious knowledge of an unlawful appropriation of Ms. Benoit's image, and continuation of the appropriation after Plaintiff's complaint. This is because, as Plaintiff well knows from the correspondence exchanged between her counsel and counsel for LFP before she filed suit, *see* correspondence at Exs. I, J and K hereto, the facts show otherwise: the March 2008 issue of *Hustler* Magazine (which included the article about and images of Ms. Benoit) was printed, delivered to subscribers, and available for retail purchase by the public on January 8, 2008, before Plaintiff's January 16, 2008 demand letter was sent to LFP, and well before Plaintiff's February 5, 2008 Complaint and Motion for Temporary Restraining Order were filed. *See* Ex. K at p. 1. (In fact, the April 2008 issue of Hustler had already been distributed and made available for sale, and the March 2008 issue taken off the shelves, by the time Plaintiff's lawsuit was filed.)

Further, despite having no legal obligation to do so, after learning of Plaintiff's complaint, LFP voluntarily agreed that it would not republish the images of Ms. Benoit in any future issue of *Hustler* magazine nor authorize or license their republication by any other licensees. (*See* Affidavit of D. Hahner, D.I. 3-1 at ¶ 6.) Thus there was no "continuation" of the alleged appropriation -- even though LFP has always believed it had the right to publish the images.

Finally, Plaintiff may not legitimately or in good faith allege that LFP knowingly and intentionally violated Ms. Benoit's right of publicity where it is clear LFP had a reasonable belief that its publication of the images of Ms. Benoit is privileged under the First Amendment to the U.S. Constitution as part of a legitimate news article on her life and career. That this belief was reasonable at the time LFP made its decision to publish the article about and images of Ms. Benoit cannot be seriously disputed where even this Honorable Court agreed that the

Constitution protected the publication at issue in this case. (*See* Dismissal Order, D.I. 13; *see also* Transcript of Hearing on Motion to Stay, D.I. 68 at 12: "[I]t was [the Court's] opinion that publication of the photographs in connection with the story about her life fell within the newsworthiness exception to the right of publicity.").

In short, in these circumstances, Plaintiff lacks any factual basis to allege that LFP acted with the requisite premeditation and malicious intent required to justify a claim for punitive damages, and thus her "punitive damages" discovery should be prohibited.[5]

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[5] Even assuming, *arguendo*, Plaintiff could properly plead a claim for punitive damages, made in good faith and solidly based in fact, in this case such damages would be limited by the U.S. Constitution to a small multiple of actual damages and would not justify discovery of even Defendant LFP's financial status generally and unrelated to the publication of the images of Ms. Benoit, specifically, much less such information of a non-party. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.") *and Dimaso v. Ford Motor Co.*, 2003 WL 22850075 at *1 (Cobb Sup. Ct. 2003) (for punitive damages trial "plaintiffs may not introduce evidence of defendant's net worth, wealth or financial condition generally" but "are limited to evidence of defendant's gross revenues, profits, and sales of [the product at issue] within Georgia and to similar matters relating to its activities in Georgia.") (citing O.C.G.A. § 51-12-5.1(c)). Thus, particularly where, as here, alleged actual damages would be *de minimis*, the wealth and assets of LFP, or its non-party affiliates, are not relevant.

B. Plaintiff's Attempt to Obtain Discovery of Non-parties From Defendant LFP Is Improper

Plaintiff also seeks from LFP discovery of non-parties L.F.P., Inc., LE Publishing Advisors, LLC, and LE Publishing, LLC, which are separate and distinct legal entities from LFP. None of these non-parties is alleged to have published any image of Ms. Benoit; and Plaintiff has offered no explanation as to why any discovery from these non-parties is relevant, much less why corporate formalities may be disregarded and discovery from these entities appropriately directed to LFP. LFP thus respectfully requests entry of a protective order prohibiting Plaintiff's improper requests that LFP provide discovery of non-parties.

C. Good Cause Exists For Entry Of The Requested Protective Order

LFP submits it has demonstrated good cause in support of this motion. Plaintiff does not have a valid claim for punitive damages, and should not be permitted to obtain sensitive and confidential non-public financial information from LFP and its non-party affiliates under the guise of a meritless claim.

V. Conclusion

For the reasons set forth herein, LFP respectfully requests that this Court enter a protective order forbidding Plaintiff from inquiring into the improper subject matters described above.

Respectfully submitted this 7th day of January 2010.

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CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER via the CM/ECF system which will automatically send notification to Plaintiff's attorneys of record, who are participants in the CM/ECF system.

This 7th day of January 2010.

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